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No. 06-230

IN THE

SUPREME COURT OF THE UNITED STATES

ALFRED POWERS, et al.,
Petitioners,

v.

WELLS FARGO BANK, N.A., et al.,
Respondents.

RESPONDENT ROSSI RUSSELL'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

In this proceeding, petitioners ask this Court to judicially legislate contrary to the expressed will of Congress. In amending 18 U.S.C. § 1964(c) of the Racketeer Influenced and Corrupt Organizations Act ("RICO") through the passage of the Private Securities Litigation Reform Act of 1995 ("PSLRA"), Congress set the boundaries for those acts or omissions that fall within securities legislation and those rights that fall under the RICO scheme. Petitioners here seek to obliterate that distinction.

The Ninth Circuit, affirming the District Court, applied the clear and unambiguous language of 18 U.S.C. § 1964(c), to bar petitioners' efforts to create legal rights unsupported by the congressional plan. That subsection, in pertinent part, provides that:

> [N]o person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962.

Petitioners here renew their twin contentions that Section 1964(c) is inapplicable to their RICO claim because it allegedly does not involve nationally-traded securities, and because their action is not a class action. Neither of these arguments offer a sound legal rationale for disturbing the Ninth Circuit's decision.

The Ninth Circuit decision was based upon clear statutory mandate and established law about which no conflict exists among the Circuit Courts of Appeal.

Petitioners' first argument that their claim is beyond Section 1964(c)'s reach fails, as a matter of law, pursuant to *S.E.C. v. J.T. Wallenbrock,* 313 F.3d 532 (2002). This case arose from the same alleged "Ponzi" scheme which precipitated this action and involved many of the same

defendants. The Ninth Circuit conclusively determined in *Wallenbrock* that the promissory notes in this case are "securities," subject to regulation under the Securities Act and the Securities Exchange Act.

Petitioners' second position that Section 1964(c) applies only to class actions has twice been rejected and should again be rejected by this Court because it directly contravenes the precise, clear and unambiguous language used by Congress.

The subsidiary contention that legislative history and intent justifies petitioners' position is equally without merit. Contrary to petitioners' assertion, the amendment to Section 1964(c) was enacted to rectify the fact that plaintiffs were recovering treble damages under RICO for securities fraud injuries – a situation unintended by Congress in passing RICO. Applying the Section 1964(c) bar only to class action plaintiffs would do violence to this overarching purpose.

Thus, the questions before this Court are as follows:

> (1) Was the Ninth Circuit's action in applying the unambiguous language of 18 U.S.C. § 1964(c), a proper basis for affirming the District Court's dismissal of petitioners' RICO cause of action since it was based upon conduct that would have been actionable as fraud in the purchase or sale of securities ?
>
> (2) Was the Ninth Circuit's decision applying the preclusive effect of 18 U.S.C. § 1964(c) to individual claims the proper interpretation of Congress' phrase "no person" in Section 1964(c)?

As the following discussion will demonstrate, these questions must be answered in the affirmative.

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REASONS FOR DENYING REVIEW

I.

THE UNDERLYING ACTION IS BARRED BY 18 U.S.C. § 1964(C) BECAUSE IT WAS BASED ON FRAUD IN THE SALE OF SECURITIES.

RICO was originally passed as a response to the war against syndicated and organized crime and established both civil and criminal remedies, including the ability to recover treble damages. *Bald Eagle School District v. Keystone Financial, Inc.* 189 F.3d 321, 327-328 (3rd Cir. 1999). Soon, however, enterprising plaintiffs, attracted by RICO's enhanced penalties, began filing RICO claims based on securities violations. This flood of claims, in turn, increased the costs of securities litigation and created a chilling effect upon the raising of capital through securities. *Krear v. Malek,* 961 F. Supp 1065, 1075-76 (E.D. Mich. Southern Div., 1997).

To stem the rising litigation tide, Congress passed the Private Securities Litigation Reform Act of 1995 ("PSLRA") intending to deter opportunistic private plaintiffs from filing abusive securities fraud claims. *Bald Eagle School District, supra,* 189 F.3d at 327-328. In keeping with this purpose, Section 107 of the PSLRA amended 18 U.S.C. § 1964(c) - which provides civil remedies for RICO violations - to state in pertinent part that:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and

> the cost of the suit, including reasonable attorney's fee, ***except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962.*** The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final. [emphasis supplied].

In *Howard v. America Online Inc.*, 208 F.3d 741, 749-750 (9th Cir. 2000), the Ninth Circuit applied this section to prohibit plaintiffs from proceeding with claims that AOL committed securities fraud as part of a pattern of racketeering activity by misrepresenting revenues, profits and number of subscribers, using improper accounting practices and illegally selling stock at a profit. Invoking Section 1964(c), the Court held that plaintiffs' securities fraud claims could not be used as predicates for a RICO violation. *Id.*, at 749-750.

Here, likewise, the core of petitioners' grievance against respondents is securities fraud. In petitioners' words, their complaint charged respondents with participating in an interstate and international 'Ponzi' scheme whereby respondents offered petitioners ninety-day promissory notes allegedly secured by the accounts receivable of latex glove manufacturers in Asia. This accounts receivable business was purportedly conducted by an "offshore trust". Petitioners were promised a 20% per quarter return on their investment.

In truth, petitioners complained, all money transactions were processed through a personal checking account and there was no evidence of any factoring contracts,

accounts receivable business, offshore trust or security interest in any receivables. Nor is there any record that petitioners' "security interests" were registered in any capacity with any Federal or state agency. In the end, petitioners and other victims of this scheme claim to have been bilked of over $250,000,000.

It is manifest from petitioners' own description of the nature of their action that the wrongful conduct and activities which formed the nucleus of their complaint pertained to fraud in the sale and purchase of securities. Petitioners counter that Section 1964(c) is nevertheless inapposite as their RICO claim does not involve "nationally traded securities".

S.E.C. v. J.T. Wallenbrock, 313 F.3d 532 (2002) robs this argument of any vitality. In that action, which was a companion action to the one at bar against many of the same parties and arising from the same alleged Ponzi scheme, the Ninth Circuit held that the promissory notes at issue in this case are "securities" subject to regulation under the Securities Act and the Securities Exchange Act. Therefore, Section 1964(c) compelled dismissal of the RICO claim.

II.

THE PLAIN LANGUAGE OF 18 U.S.C. § 1964(C) BARS PETITIONERS' ACTION.

Petitioners' primary point on appeal appears to be that their RICO claim falls outside Section 1964(c)'s prohibitive scope because their action is not a class action. Implicit in this assertion is the theory that an individual action such as this one is exempt from Section 1964(c)'s proscription. Judged by Section 1964(c)'s plain language, the proffered interpretation is wholly insupportable.

Under the established approach to statutory interpretation, the task of resolving the scope of Section

1964(c) begins where all such inquiries must begin: with the language of the statute itself. *Landreth Timber Co. v. Landreth* (1985) 471 U.S. 681, 685, 105 S.Ct. 2297, 2301, 85 L.Ed.2d 692. In this case, it is also where the inquiry should end. Where, as here, " 'the statute's language is plain, 'the sole function of the courts', is 'to enforce it according to its terms'". *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 5, 120 S. Ct. 1942, 1948, 147 L.Ed.2d 1 (2000).

The court's task is "to give effect to the will of the Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive". *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571, 102 S.Ct. 3245, 3250, 73 L.Ed.2d 973 (1982). In interpreting a statute, a court should give words their plain, natural, ordinary and commonly understood meanings. *Id.* If the language of a statute is clear, a court looks no further than that language in determining the statute's meaning. *Id.*

Section 1964(c) is unequivocal. It states that *"no person"* may rely upon *"any conduct"* that would have been actionable as fraud in the purchase or sale of securities to establish a RICO violation. Adhering then to the axiom that Congress "says in a statute what it means and means in a statute what it says" [*United States v. Romo-Romo*, 246 F.3d 1272, 1275 (9th Cir. 2001)], the phrase "no person" in Section 1964(c), read plainly and naturally, can only be construed to mean that Section 1964(c) applies broadly to any litigation brought by *any* person or persons, whether individually, collectively, or as a class action.

The interpretation urged by petitioners, on the other hand, would require an unnatural and extra-textual reading of the statute. Specifically, to indulge petitioners, this Court would have to transform the "no person" reference in Section 1964(c) to "no plaintiff in a class action" so that the statute would then read: "...except that no *plaintiff in a class action* may rely upon any conduct that would have been actionable

as fraud in the purchase or sale of securities to establish a violation of section 1962".

Pointedly, had Congress harbored this intention, there is no reason why it could not have written the statute to say so. Courts may not interpret a statute so as to render some of its language superfluous. *Hearn v. Western Conference of Teamsters Pension Trust Fund*, 68 F.3d 301, 305 (1995). Certainly, courts cannot, in the guise of interpretation, arrogate to themselves the power to re-write the plain and unambiguous text of a statute.

Notably, in other parts of the PSLRA, Congress was not reticent in including expressly restrictive language when it meant to do so. Thus, in 15 U.S.C. § 78u-4 of the PSLRA, Congress provided:

> (a) Private Class Actions.
>
> (1) In general: The provisions of this subsection shall apply to each private action arising under this title that is brought as a plaintiff class action pursuant to the Federal Rules of Civil Procedure. . . . emphasis supplied).

There is no doubt that when Congress used the qualifying class action language in a limited subsection of this statute, but not in other parts, Congress knew and intended what it was doing. The *absence*, then, of the qualifying class action language in Section 1964(c) can only evince an unmistakable Congressional intent that the statute is not to be so limited.

III.

THE PURPOSE, HISTORY AND LEGISLATIVE INTENT BEHIND 18 U.S.C. § 1964(C) BARS PETITIONERS' ACTION.

Acutely aware that the unadorned language of Section 1964(c) is inimical to their position, petitioners take their stand upon its legislative history and intent, contending, in essence that despite its text, Section 1964(c) should nevertheless be construed to preclude only class actions and not individual actions because that is what the Legislature intended.

This Court should decline petitioners' invitation to vault past Section 1964(c)'s clear statutory text. Here, the words chosen by Congress, given their plain meaning, leave no room for 'clarification' through legislative history or intent. "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes". *Griffin,* 458 U.S. at 572, 102 S.Ct. at 3251.

To be sure, the plain meaning of legislation should be conclusive, *except* in the "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters". *Id.* In such cases, the intention of the drafters, rather than the strict language, controls. *Id.* However, only a clearly expressed contrary intention in legislative history may overcome the "strong presumption" that Congress expresses its intent through language it chooses. *INS v. Cardozā-Fonseca,* 480 U.S. 421, 432 n. 12, 107 S.Ct. 1207, 1213 n.12, 94 L.Ed.2d 434 (1987).

The legislative history surrounding Section 1964(c)'s amendment is conspicuously void of any contrary intention to overcome the plain meaning of the post-amendment statute. Indeed, it supports the plain-language interpretation.

Legislative history surrounding passage of the PSLRA establishes that Congress specifically considered the issue of the scope of the PSLRA, and intended it to apply very broadly, to check perceived abuses of the RICO statute. In *Bald Eagle School District, supra*, the Third Circuit explained the purpose behind the PSLRA thusly:

> Prior to 1995, a private plaintiff could assert a civil RICO claim for securities law violations sounding in "garden variety" fraud [citation]. Inasmuch as "fraud in the sale of securities" was a predicate offense in both criminal and civil RICO actions,[citation] plaintiffs regularly elevated fraud to RICO violations because RICO offered the potential bonanza of recovering treble damages.
>
> However, in 1995, Congress enacted the Private Securities Litigation Reform Act ("PSLRA"), Pub.L. No. 104-67, 109 Stat. 737 (1995). The PSLRA amended RICO by narrowing the kind of conduct that could qualify as a predicate act. ....
>
> We stated that the legislative history shows that Congress enacted the RICO Amendment "to address a significant number of frivolous actions based on alleged securities law violations." Id. at 164 (quoting 141 Cong. Rec. H2771 (daily ed. Mar. 7, 1995)(statement of Rep. Cox)). The "focus" of the Amendment was on "completely eliminating the so-called 'treble damage blunderbuss of RICO' in securities fraud cases." Bald Eagle,

supra, 189 F.3d 321 at 327-328 Id. (quoting 141 Cong. Rec. H2771).

In *Krear, supra* the court also exhaustively detailed the aims underlying the PSLRA, beginning with the following quote from The House Conf. Rep. No. 104-369:

> The Conference Committee amends section 1964(c) of title 18 of the U.S.Code to remove any conduct that would have been actionable as fraud in the purchase and sale of securities as racketeering activity under civil RICO. *The Committee intends this amendment to eliminate securities fraud as a predicate offense in a civil RICO action.* In addition, the Conference Committee intends that a plaintiff may not plead other specified offenses such as mail or wire fraud, as predicate acts under civil RICO if such offenses are based on conduct that would have been actionable as securities fraud. *Krear, supra,* 961. F.Supp. at 1075. (emphasis added)

The *Krear* court went on to note that:

> The reason for the elimination of conduct constituting securities fraud as a RICO predicate act, as proffered in the Senate Report, is to reduce the cost of raising capital. See Senate Report, supra, p. 7. Representative Cox of California, who introduced the bill, stated on the Congressional record that: '... [O]ur economy's health depends on the efficient operation of America's capital markets. We must continue to balance the provisions of adequate

remedies for injured investors and the imposition of excessive penalties on all participants in our capital markets. The treble damage blunderbuss of RICO undermines this balance and imposes exorbitant litigation costs, impedes the raising of capital and ultimately puts these costs on the shoulders of consumers and emerging innovative companies.' [141 Cong. Rec. H2773 as cited in Krear, supra, 961 F.Supp at 1076.]

Mr. Cox further explained that the aim of the amendment was to correct the misapplication of RICO. Mr. Cox, invoking the Supreme Court's opinion in Sedima, S.P.R.L. v. Imrex Co. Inc., stated that "[i]n its private civil version RICO is evolving into something quite different from the original conception of its enactors; in other words, Congress." 141 Cong. Rec. H2772 (Statement of Rep. Cox). Mr. Cox quoted Chief Justice Rehnquist who stated: "Virtually everyone who has addressed the question agrees that civil RICO is now being used in ways that Congress never intended when it enacted the statute in 1970. Most of the civil suits filed under the statute have nothing to do with organized crime." [citation]

Representative Cox went on to state that: Because many claims that could be asserted as securities laws claims can also be characterized as mail or

wire fraud, and because mail and wire fraud are also predicates for civil RICO liability, Plaintiffs' attorneys have a devastating, potent, and readily available alternative for bringing actions under RICO instead of under our securities laws. As the SEC general counsel stated in his 1989 testimony before the House Committee on the Judiciary, and I quote now, "The commission is concerned that the civil liability provisions of RICO can, in many cases, convert private securities law fraud claims into RICO claims. Successful plaintiffs in such cases are entitled to treble damages, despite the express limitations on recovery under the securities laws to actual damages. Private plaintiffs may be able to bypass the carefully crafted liability provisions of the securities laws and thereby recover damages in cases in which Congress or the courts have determined that no recovery should be available".

* * * * * *

[T]he failure to adopt this amendment would undermine the reforms we are hoping to achieve because attorneys could then do an end run around all of the reform by simply using the RICO statute... [141 Cong. Rec. H2771 (statement of Rep. Cox).]

Finally, Mr. Cox concluded that: It is certainly important that criminals be prosecuted and that is exactly what will happen before and after this

> amendment. But what we do not want to see is for our carefully crafted Federal securities laws to be shunted aside and instead for people to be able to use a statute never intended to apply in these civil cases in this way so that they can get treble damages, something not provided for in our securities laws, so that they can get discovery going all the way back 10 years to show a pattern which is part of RICO, not part of the securities laws, and in short so they can gin up settlements where a settlement is not in order. [141 Cong. Rec. H2778 (Statement of Rep. Cox). Quoted in *Krear, supra*, 961 F. Supp. at 1075-1076.]

Other representatives expressed similar concerns:

> 141 Cong. Rec. H2773-74 [Statement of Rep. McCollum] ... "Congress never intended for the RICO statute to be used as the principal means of litigating disputes over securities transactions. The securities laws themselves provide aggrieved buyers and sellers with private causes of action so that they may seek compensation for their losses. The increases in the use of the racketeering statue (sic) for this purpose, however, has produced consequences that Congress never intended. The threat of RICO sanctions has had a chilling effect on entrepreneurship and ultimately economic growth."). *Krear, supra*, 961 F.Supp. at 1076, fn. 16.

> 141 Cong. Rec. H2775 (Statement of Rep. Fields) (stating that "... we enacted civil RICO many years ago to provide private citizens with a weapon against organized crime and racketeering. We did not intend RICO to be a supplement to the Federal securities laws. We never intended to give trial lawyers treble damages in these types of civil lawsuits. Nonetheless, unless we adopt this amendment, plaintiffs' attorneys will use RICO to evade our efforts of reform."). *Krear, supra*, 961 F.Supp. at 1076, fn. 16.
>
> 141 Cong. Rec. H2776 (Statement of Rep. White) (stating: "That is why a statute designed to apply to racketeering and organized crime in 40 percent of the cases now applies to securities lawsuits. This is a statute that is out of control. If we do not exempt this litigation from this statute, we will never get this job done.") *Krear, supra*, 961 F.Supp. at 1076, fn. 16.

Congress addressed the concerns of Justice Rehnquist and the flooding of the Federal courts with securities based RICO lawsuits by amending Section 1964(c) to completely eliminate RICO's treble damage threat in securities fraud cases, thereby reducing the cost of raising capital and encouraging economic growth. Nothing in the legislative history supports a departure from the ordinary meaning of the plain language of the statute.

It is likewise evident that literal application of Section 1964(c) to petitioners' case would *not* thwart its obvious

purposes. Nor is there any significant reason why Congress would have intended, or any policy reason would compel, that individual RICO actions involving securities fraud be treated differently than class actions. Rather, the statute's legislative history confirms that Congress intended the statute to mean exactly what it says, *i.e.*, "no person" can predicate a RICO claim on securities fraud.

In fact, it is petitioners' position which would upset the statutory purpose of curtailing *all* RICO claims based on securities violations. In sum, applying the statute to this case is consistent with the apparent purpose of the legislation. The conclusion reached by the Ninth Circuit was proper.

IV.

SLUSA IS INAPPOSITE TO THIS CASE

Petitioners also attempt to bolster their position by citing to the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"). SLUSA provides that "[a]ny covered class action brought in any state court involving a covered security, as set forth in subsection (b), shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b)." 15 U.S.C. § 78bb(f)(2). SLUSA expressly preempts such state law claims by providing:

> No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging--(A) a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security; or (B) that the defendant used or employed any manipulative or

> deceptive device or contrivance in connection with the purchase or sale of a covered security. 15 U.S.C. § 78bb(f)(1).

SLUSA is of no assistance to petitioners as petitioners have brought individual actions, not class actions. By its terms, SLUSA was enacted after the passage of the PSLRA with the intent of making the federal courts the primary venue for class action securities claims. *Feitelberg v. Merrill Lynch & Co., Inc.* 234 F.Supp.2d 1043, 1046 (N.D. Cal. 2002). It has no bearing on the issue before the Court, i.e., the scope of Section 1964(c), and must be disregarded.

CONCLUSION

Here, petitioners' efforts to obtain what Congress has not granted should be denied. Petitioners' RICO claim is based upon conduct that would have been actionable as fraud in the purchase or sale of securities. This claim does not form the basis for an action in the Federal courts and thus, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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